No. 87-2050

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN COYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX LEVINE and MALIK TUNADOR,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is constituted for the purpose of advocacy in support of a proper rendering of the First Amendment. While typically this involves the Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate and historically acceptable governmental acknowledgment of the religious heritage of this country embodied in the legal holiday of Christmas and against censorship of Americas's religious heritage. The Court's decision in this case will dramatically affect the ability of our nation's elected officials at all levels of government to recognize the religious heritage of America upon special occasions in keeping with the best traditions of our nation. Otherwise, a pall of secularism that denies history will descend upon all of American public life.

The National Legal Foundation is a non-profit corporation organized to defend, restore and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for Amicus Curiae, Robert K. Skolrood is Executive Director and Douglas W. Davis is Senior Staff Attorney for The National Legal Foundation. Counsel for Amicus Curiae specialize in constitutional litigation and have participated in significant cases relating tc First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this

case. Counsel of Record for all parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

ISSUE PRESENTED

Does the inclusion of a creche and menorah in a public display commemorating the Christmas holiday violate the Establishment Clause of the First Amendment?

SUMMARY OF ARGUMENT

This Court has often looked to history to review the actions of the Framer's of the First Amendment and thereby determine how they thought that Amendment should be applied. The historical record reveals that the Framer's saw no conflict between the prohibitions of the First Amendment particularly the Establishment Clause, and government acknowledgment of the religious heritage of the American people and nation in the context of special occasions. For this reason, the Framers sanctioned opening prayers at sessions of Congress, acknowledged God in Presidential inauguration speeches, and proclaimed days of Thanksgiving in recognition of God's blessings upon the nation. Each of these practices continues to the present day having withstood challenges in this Court. In addition to these practices, government acknowledges our religious heritage upon its coins, in our Pledge of Allegiance, upon our government buildings, and by proclamations in the executive branch.

Observation of the Christmas holiday by public display of a creche or menorah is no different than other practices recognizing America's religious heritage. The display is not a proselytizing activity, but rather a permissible acknowledgment of the religious nature of a legally recognized American holiday. Any attempt to sanitize the observance of Christmas of all religious aspects would be contrary to the intent of the Establishment Clause as revealed in the actions of its Framers.

Display of the creche and menorah in commemoration of the Christmas holiday is also permissible under the tri-partite test announced in Lemon v. Kurtzman, 403 U.S. 602 (1971). The creche and menorah, as part of the County and City's Christmas display, serve the secular purpose of recognizing a legal holiday. The creche and menorah in the display are traditional symbols of the American historical and cultural celebration of the holiday. The dominant message, and therefore the primary effect of the display, is to acknowledge the holiday in all its many dimensions, not to advance religion. The presence of a certain number of non-religious decorations in the vicinity of the creche and menorah are of no constitutional significance. It is the display within the context of acknowledging the holiday which determines its primary effect. Finally, no excessive entanglement exists between religion and the government.

The decision of the Court of Appeals conflicts with the intentions of the Framers of the First Amendment and with present Constitutional analysis. This Brief of The National Legal Foundation Amicus Curiae, in support of petitioners urges reversal of the decision of the Third Circuit Court of Appeals.

THE COUNTY OF ALLEGHENY

Petitioners

v.

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER

Respondents

ARGUMENT

I.

Inclusion Of A Creche Or Menorah In A Public Display Observing The Christmas Holiday Does Not Violate The Intentions Of The Framers Of The First Amendment As Revealed By History.

In evaluating any case under the Religion Clauses of the First Amendment the Court has always sought to apply the clauses so as not to "undermine the ultimate constitutional objective as illuminated by history." Walz v. Tax Commission, 397 U.S. 664, 671 (1970). As the Court has noted with regard to interpreting the Constitution, "Any deviation from their [the Framer's] intentions frustrates the permanence of

that Charter and will only lead to ... unprincipled decisionmaking ...." Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

Recurrence to these fundamental principles is particularly important in the present case. Reflection upon the historical events surrounding the adoption of the First Amendment shows that acknowledgment and observance of America's religious culture and heritage upon special occasions by government is not the type of activity which the Framer's intended the Establishment Clause to forbid.

A. The Framers of the First Amendment sponsored and participated in observances recognizing the religious heritage of America.

The public actions of the Framers of the First Amendment contemporaneous with the debate and adoption of that Amendment establish that acknowledgment and

observance of America's religious culture and heritage by government is not the type of activity that the First Amendment was intended to prevent. As the Court has noted, the Congress which drafted the First Amendment "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument" Myers v. United States, 272 U.S. 52, 174-5 (1926), cited in Lynch v. Donnelly, 465 U.S. 668, 674 (1984).

In Marsh v. Chambers, 463 U.S. 783 (1983), the Court noted that just three days after the First Congress authorized appointment of paid chaplains to open sessions of Congress with prayer, the same Congress reached final agreement on the language of the First Amendment. Marsh, 463 U.S. at 788. The Framer's of the First Amendment saw no conflict between

the proscriptions of that Amendment and the daily observance of prayer at the very seat of government.

This understanding was not limited to the legislative branch. George Washington, upon the occasion of his inauguration, took opportunity to acknowledge America's religious heritage. Standing on the second-floor balcony of Federal Hall, then the seat of the United States government, he stated:

> It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government .... In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own .... No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the

> character of an independent nation seems to have been distinguished by some token of providential agency.

G. Washington, First Inaugual Address, in 1 Messages and Papers of the Presidents 44 (J. Richardson ed. 1897).

It was the First Congress which urged President Washington,

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness;

G. Washington: A National Thanksgiving, Messages and Papers, 1:56.

As the Court has noted, this resolution was passed on the same day that final agreement was reached on the language of the Bill of Rights, including the First Amendment. Marsh, 463 U.S. at 788 n.9; Lynch, 465 U.S. at 675 n.2. President Washington set aside November 26, 1789:

> to be devoted by the people of

> these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war ... for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed ...
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed ....

Messages and Papers 1:56.

This tradition, carried out by our presidents and fixed by the official

Thanksgiving holiday, is the clearest example of permissible acknowledgment by the government of the religious aspect of American life and culture. As President Reagan noted in a recent Thanksgiving proclamation:

> As we remember the faith and values that made America great, we should recall that our tradition of Thanksgiving is older than our Nation itself. Indeed, the native American Thanksgivings antedated those of the new Americans. In the words of the eloquent Seneca tradition of the Iroquois, " ... give it your thought, that with one mind we may now give thanks to Him our Creator."
>
> From the first Pilgrim observance in 1621, to the nine years before and during the American Revolution when the Constitutional Congress declared days of Fast and Prayer and days of Thanksgiving, we have turned to Almighty God to express our gratitude for the bounty and good fortune we enjoy as individuals and as a nation. America truly has been blessed.

R. Reagan, 1984 (Book 2) Pub. Papers 1576 (Proclamation 5269, October 19, 1984).

Acknowledgment of America's religious heritage is by no means limited to

Congressional prayer, inaugural addresses, and Thanksgiving proclamations. The national motto, "In God We Trust;" the Pledge of Allegiance; the Capitol prayer chapel; the depiction of Moses and the Ten Commandments in the Court's chambers; Proclamation of a National Day of Prayer; and Proclamation of Jewish Heritage Week are just a few of "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." Lynch, 465 U.S. at 676-77 (emphasis added).

In Marsh, the Court stated that "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress - their actions reveal their intent." Marsh, 463 U.S. at 790. As the

evidence above clearly shows, the Framers of the First Amendment never intended the Establishment Clause to forbid the acknowledgment of our religious heritage. Any present interpretation of that Clause by the Court that "sweeps away the practices of the Framers themselves, ... is implausible as well as inappropriate. We should not treat them [the Framers] as hypocrites about their own handiwork." American Jewish Congress v. City of Chicago, 827 F.2d. 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting).

B. Display of a creche or menorah by the County or City during the Christmas season is a historically permissible acknowledgment of the religious heritage of that national holiday.

The display of the creche and menorah on public property during the Christmas holiday is indistinguishable from acknowledgments of our religious heritage

practiced at the time the First Amendment was adopted. Christmas has been observed and celebrated since the first settlment of the country. The use of crech scenes as part of the American celebration of Christmas date to the Moravian settlements in Pennsylvania beginning in 1741. E. Tennant, American Christmases: From the Puritans to the Victorians 66-71 (1975). After the Revolutionary War, towns such as Bethlehem, Pennsylvania and Salem (now Winston-Salem), North Carolina, founded by the Moravians, made erection of a creche scene, then called a Putz, a community project. American Christmases, at 71. As distinctly Moravian communities were absorbed into general American culture, the creche became a part of our Christmas celebration.

> By the mid-nineteenth century, the young Republic had matured into the American nation: geographically spread from "sea to shining sea," culturally distinctive, and

> spiritually content with religious diversity. Likewise, the celebration of Christmas coalesced; bits and fragments of ancient customs from many homelands blended with distinctly American innovations to become the "old-fashioned Christmas."

American Christmases at 99.

Like the practice of observing a day of Thanksgiving to God, or opening legislative sessions with paid chaplains, the observation of the Christmas holiday dates to the very founding of the country, with the specific display of creche scenes existing for over 200 years. Both Thanksgiving and Christmas their religious character not withstanding, are legal public holidays on which federal government employees are paid regular wages. 5 U.S.C.S. §§6103, 6104. As noted above, there has never been any attempt to sanitize the Thanksgiving holiday of its religious character. Presidents from Washington to Reagan have openly expressed

that gratitude must be directed to God. That practice in America is traced to a group of religious people - the Pilgrims - who came to this country "for the Glory of God, and Advancement of the Christian Faith." Mayflower Compact in R. Perry, Sources of Our Liberties 60 (1978).

Similarly, there is no reason why the display of a creche or menorah within the County's and City's exhibits "would so 'taint' the ... exhibit as to render it violative of the Establishment Clause." Lynch, 465 U.S. at 686. In Lynch the Court specifically stated that forbidding use of a creche in a government- sponsored exhibit acknowledging the holiday "at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted overreaction

contrary to our history and to our holdings. Lynch, 465 U.S. at 686.

II

Inclusion Of A Creche Or Menorah In A Public Display Observing The Christmas Holiday Is Mandated Under Current First Amendment Analysis As Well As Historical Analysis.

While the Court has "repeatedly emphasized our unwillingness to be confined to any single test or criterion" in evalutating claims under the First Amendment, Lynch, 465 U.S. at 679, the Court has consistently relied upon the three-part test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). To pass scrutiny, the challenged conduct must have a secular purpose, must not have the primary effect of advancing or inhibiting religion, and it must not create excessive entanglement of government with religion.

A. Inclusion of a creche or menorah in a public display observing the Christmas holiday serves a secular legislative purpose.

The Appellate Court made no statement with regard to the first prong of the Lemon test, resting its decision solely on the second, "primary purpose," prong. American Civil Liberties Union v. County of Allegheny, 842 F.2d. 655, 663 (3rd Cir. 1988). The Court in Lynch, however, decisively answered that question:

> The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

Lynch, 465 U.S. at 681.

This statement comports with the historical observance by government of our national heritage. There is absolutely no evidence in the record that "inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." Lynch, 465 U.S. at 680. Neither does the display

promote one religion over another. It is merely a recognition of religion as an integral part of American culture.

B. Inclusion of a creche or menorah in a public display observing the Christmas holiday does not have the primary effect of advancing or inhibiting religion.

The Court of Appeals rested its opinion solely upon a supposed violation of the second, primary effect, test of the Lemon 3-part analysis. County of Allegheny, 842 F.2d. at 661-62. In doing so, the court ignored the controlling language of this Court's opinion in Lynch. There the Court stated:

> What was said about the legislative prayers in Marsh ... and implied about the Sunday Closing Laws in McGowan is true of the city's inclusion of the creche: its 'reason or effect merely happens to coincide or harmonize with the tenets of some ... religions.'
>
> The Court has made it abundantly clear, however that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit

> upon [religion] is, for that reason alone, constitutionally invalid." Nyquist, 413 U.S. at 771 .... Here, whatever benefit to one faith or religion or to all religions is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

Lynch, 465 U.S. at 682, 683.

To avoid this clear and compelling holding, the Appellate Court formulated a six variable test for assessing the primary effect of display of the creche and menorah at the County and City Buildings.* County of Allegheny,

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* The six variables are:
(1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

842 F.2d. at 662. Included in these six variables were supposedly significant distinctions from Lynch utilized in two other cases. American Civil Liberties Union v. City of Birmingham, 791 F.2d. 1561 (6th Cir. 1986), cert den. 107 SCt. 421 (1986) (creche not subsumed in other Christmas decorations); American Jewish Congress v. City of Chicago, 827 F.2d. 120 (7th Cir. 1987) (creche located at city hall rather than park).

The powerful dissenting opinion of Judge Weis in the Court of Appeals absolutely refutes the attempted departure from Lynch. Addressing the placement issue, Judge Weis noted that the Lynch Court specifically stated that the Pawtucket creche "was essentially similar to other displays found nationwide - 'often on public grounds.' Lynch, 465 U.S. 671," County of Allegheny, 842 F.2d at 668. (Weis, J., dissenting). Judge

Weis also noted that the placement distinction was difficult to reconcile with the holding in Marsh, where the challenged prayers took place in the legislative hall itself and yet were not considered an action which had the primary effect of advancing religion.

It has also been argued that the creche and menorah were impermissibly displayed because they were not subsumed in more secular decorations which made the creche in Lynch an acceptable acknowledgment of the holiday. Instead it was "the creche in the context of the Christmas season," that altered "what viewers may fairly understand to be the purpose of the display - as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." Lynch 465 U.S. at 679, 692, (O'Connor, J. concurring), cited in County

of Allegheny 842 F.2d at 669. (Weis, J., dissenting). This approach is no different in principal from the approach taken by the District Court in Lynch and specifically rejected by this Court. It focuses "almost exclusively on the creche" - How big is the creche? How close is it to other symbols? - and not on "the proper context of the Christmas Holiday season." Lynch, 465 at 680.

There is no violation of the "primary effect" prong of the Lemon test. There is no evidence suggesting that the placement of the creche and menorah in the public diplay "has been exploited to prozelytize or advance any one, or to disparage any other, faith or belief." Marsh, 463 U.S. at 794-95. Rather, "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." Marsh, 463 U.S. at 792.

C. Inclusion of a creche or menorah in a public display observing the Christmas holiday does not create excessive entanglement with religion.

The Court of Appeals made no finding with regard to the 3rd prong of the Lemon test. County of Allegheny, 842 F.2d at 663. In Lynch, the Court specifically noted that Pawtucket did not consult church authorities about displaying the creche. It did expend nominal sums for erection and lighting of the display. This limited achievement was, however, not "the 'comprehensive, discriminating, and continuing state surveliance' or the 'enduring entanglement' present in Lemon, 403 U.S., at 619-622. Cited in Lynch, 465 U.S. at 684. The present case presents even less involvement than was recognized in Lynch. No money is expended for the creche. Although the menorah is erected by city employees, the expense is incidental under the Lynch analysis.

There is nothing that would place the present Christmas display outside the holding of this Court in Lynch.

III.

Conclusion

Whether analyzed according to the intent of the Framers of the First Amendment as revealed by their actions or under the 3-part Lemon test most frequently used by this Court, the inclusion of a creche or menorah in a public display during the Christmas holiday does not violate the Establishment Clause. The display is a permissible acknowledgment of the religious heritage embodied in America's celebration of the Christmas holiday. In this regard, the display is no different from "Prayers in our legislative halls; the appeals to the Almighty in the messages of our Chief Executive; the proclamations making

Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths - these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies ...." which have never been held as "flouting the First Amendment." Zorach v. Clauson 343 U.S. 306, 312-13 (1952).

Nothing in the history of jurisprudence of this nation reveals an intent on the part of the Framers to censor or eradicate religion from public life or to deny the religious heritage of this nation. In fact, the opposite is true. Commenting in the ruling in Lynch, writer and philosopher, Richard John Neuhaus stated:

> The Pawtucket ruling .... says that our public life should reflect the vibrant pluralism that is America. That pluralism includes religion and religious symbols in public.
>
> A public square that is stripped of all signs of our differences may offend nobody, but it will also be a public square in which nobody feels

> at home. A naked public square or a homogenized pulic square is a profoundly undemocratic public square.

R. Neuhaus, Religion in Public Places, Wash. Times, May 2, 1986, at 3D.

The decision of the Court of Appeals runs counter to this fundamental truth by attempting to sanatize all public acknowledgment of our nations holidays and heritage of religion and religious symbols. For this reason, it is essential that this conflict be resolved in favor of the petitioners.

Respectfully submitted,

Douglas W. Davis
Attorney Amicus Curiae
The National Legal Foundation

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. 87-2050

COUNTY OF ALLEGHENY

Petitioners

v.

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER

Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 1988, three copies of the Brief of Amicus Curiae, and a copy of the Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5 (b):

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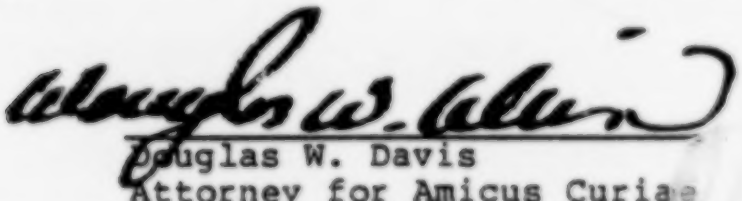
I further certify that service is not required on any other persons, and that all parties required to be served have been served as required under S. Ct. Rule 28.



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STATEMENT CONCERNING FIRST CLASS MAILING
(Pursuant to Rules 28.2 and 28.5)

I hereby affirm that the enclosed Brief of Amicus Curiae was deposited in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of this Court, on November 17, 1988, which was within the time allowed for filing; and that I am a member of the Bar of this Court.

Subscribed this 17th day of November 1988.

The National Legal Foundation

By: Douglas W. Davis
Douglas W. Davis
Attorney for Amicus Curiae
National Legal Foundation

Subscribed and Sworn before me this 17th day of November, 1988.

Jennifer G. Spell
Notary Public

My Commission Expires: September 1, 1992.